Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ALGIS J. GALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

1. Whether a sentence is reasonable under 18 U.S.C. Section 3553(a) when a District Court fails to consider all the factors in 18 U.S.C. Section 3553(a).
2. Pursuant to *United States v. Booker*, 125 S.Ct. 738 (2005), whether a District Court is required to address all of a petitioner's arguments for a lower sentence and to state on the record the reasons for rejecting such arguments.
3. Whether a sentence is reasonable under 18 U.S.C. Section 3553(a) when a District Court fails to address any documentary evidence warranting a non-incarceration sentence, submitted by petitioner in his sentencing memorandum.
4. Whether a prison sentence is contrary to *Blakely v. Washington* (2004), 124 S.Ct. 2531, when it is based in large part on a probation officer's interpretation of a prior conviction occurring seventeen years prior to petitioner's sentencing.

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Opinion Below

The opinion of the court of appeals is reported in the Federal Reporter at *United States v. Gale*, 468 F.3d 929 (6th Cir. 2006).

Jurisdiction

The judgment of the court of appeals was entered on November 20, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional, Statutory, and Guidelines Provisions Involved

The relevant constitutional, statutory, and Sentencing Guidelines provisions involved are set forth in an appendix to the petition. App., *infra,* 32a-35a.

STATEMENT

Petitioner was indicted for one count of mail fraud and two counts of wire fraud. He pled guilty to one count of wire fraud, in violation of 18 U.S.C. Section 1343. He received a prison sentence of eighteen months. The Sixth Circuit Court of Appeals affirmed his sentence.

1. The Underlying Facts

The indictment in this case alleged that Petitioner attempted to defraud Midbanc, Inc. (Midbanc) who agreed to loan Petitioner $60,000 to purchase two classic Cadillac cars. The actions that formed the basis for the indictment occurred in 1996. The loan was originally in Petitioner's name alone. but another name was necessary to secure the loan. The transaction would have been completed had Midbanc, Inc. delivered the cars, as promised, to Petitioner. However,

Airinhos Serradas, the person whose name was unwittingly placed on the loan documents (prepared by unindicted coconspirator Gary DeTrano) as a cosignor, called Midbanc and informed Midbanc he was not part of the loan transaction. As a result, the cars were stopped in transit and never delivered to Petitioner despite numerous expenses being paid by Petitioner in order to prepare the cars for restoration and resale.

The evidence reveals that Petitioner was and is an avid collector and restorer of classic cars, particularly Cadillacs. Once restored, he resells the vehicles for a profit. Gary DeTrano, who was never charged and never paid a penny of restitution, provided paperwork with a co-applicant, Airinhos Serradas's name and set up the false documentation submitted to Midbanc. DeTrano owed Serradas money on an old debt. Petitioner's name was on the loan documents along with Serradas. Unlike DeTrano, Petitioner never hid his identity or location during the transaction. In order to obtain a greater loan, Petitioner and DeTrano provided Midbanc two bills of sale that over-inflated the purchase price of the vehicles. Midbanc never checked with the sellers to determine what Petitioner actually paid for the cars.

Unlike the typical mail or wire fraud case, Petitioner had every intention to restore the cars, show them, and resell them for profit, thus allowing him to fully repay the loan from Midbanc. As the Government stated several times on the record, if Serradas had not found out his (Serradas) name was on the loan and made inquiries, the transaction would have gone through, the loan repaid, and nobody would have been the wiser.

Petitioner was indicted in March 2001, shortly before the statute of limitations was set to expire.

2. The District Court Proceedings

On March 31, 2001, Algis J. Gale, Petitioner, was indicted and charged with one count of mail fraud and two counts of wire fraud. The trial court held motions hearings on Petitioner's motion to suppress, his motion to dismiss for pre-indictment delay and motion to dismiss for failure to comply with the statute of limitations. The trial court granted the motion to suppress but denied the remaining motions.

On January 28, 2003, Gale pled guilty to count one of the indictment while the remaining two counts were dismissed. Due to a number of factors including changes in the federal sentencing laws, the final presentence investigation report and sentencing were delayed in this matter.

A sentencing hearing began on June 7, 2005 but was continued so that the parties could provide the trial court additional information regarding the issue of restitution. On August 17, 2005, the trial court resumed the sentencing hearing. After hearing arguments from the parties, the trial court sentenced Petitioner to eighteen months in prison. (App., *infra*, at 28a-31a).

A timely notice of appeal was filed. On September 13, 2005, a Motion to Stay the Sentence was filed by Petitioner. On October 27, 2005, the District Court granted Petitioner's Motion to Stay imposition of sentence.

3. The Court Of Appeal's Decision

On November 20, 2006, a unanimous panel of the court of appeals affirmed Petitioner's conviction. The court began by analyzing 18 U.S.C. § 3553(a) in the post-*Booker* landscape, stating "a district court must impose a sentence sufficient, but not greater than necessary to comply with the purposes of § 3553(a)." *United States v. Gale*, 468 F.3d 929, 933 (6th

Cir. 2006), citing *United States v. Cage*, 458 F.3d 537, 540 (6th Cir. 2006). The court noted that the Sixth Circuit "has determined that a reasonableness review contains both substantive and procedural components." *Id.* at 934, citing *United States v. McBride*, 434 F.3d 470, 478 n.3 (6th Cir. 2006). In addition, the court stated that "[t]he district court must articulate the reasons for the particular sentence imposed in order to enable this Court to engage in a meaningful reasonableness review of the sentence." *Id.* at 933-934, citing *United States v. Jackson*, 408 F.3d 301, 305 (6th Cir. 2005). The court concluded by saying "[t]he district court need not explicitly reference each of the § 3553(a) factors in its sentencing determination" but "there must be sufficient evidence in the record to affirmatively demonstrate the court's consideration of [these factors]." *Id.* at 934, quoting *United States v. Webb*, 445 F.3d 865, 869 (6th Cir. 2006).

The court addressed the language of § 3553(a)(1) and rejected Petitioner's argument that his sentence was unreasonable. The court was not persuaded that Petitioner's health and family problems warranted a non-incarceration sentence. The court also rejected Petitioner's contention that a non-incarceration sentence was warranted due to his significant loss of income and assets, monies he had to expend only to never receive the vehicles, and his good behavior for the approximately ten years from the date of the offense to sentencing.

The court reviewed the remaining factors of § 3553(a) along with Petitioner's contention that there were several claims the District Court failed to consider including "a number of documents that were not explicitly referenced by the district court," which is "proof that the district court did not consider them in fashioning his sentence." *Id.* at 939-940. The court found "no basis for remand on these claims." *Id.* at 940. The court stated, however, "remand may be appropriate" when a "district court provides little, if any,

affirmative indication that it considered all of the relevant sentencing factors and evidence when it sentenced the defendant." *Id.* at 940.

The court referenced the arguments not "expressly address[ed]" by the District Court, saying, "it was not required to do so." *Id.* at 940. It continued saying, "[a] sentencing judge has no more duty than we appellate judges do to discuss every argument made by a litigant; arguments clearly without merit can, and for the sake of judicial economy should, be passed over in silence." *Id.*, quoting *United States v. Cunningham*, 429 F.3d 673, 678 (7th Cir. 2005).

The court finished its review of Gale's sentence by briefly dealing with the exhibits and documents submitted in support of Petitioner's arguments but never addressed by the District Court. "Finally, a district court need not describe in detail or list all of the documents or other evidence it considered during sentencing." *Id.* at 941. The court based this statement on a "presumption in the law that a district court knows and applies the law correctly." *Id.*, citing *United States v. Buchanan*, 449 F.3d 731, 741 (6th Cir. 2006). Thus, the court reasoned, "without some affirmative indication in the record to the contrary (apart from the sentence imposed), we presume the district court has reviewed the evidence provided to it." *Id.*

4. Relevant Case Law And Statutes

Case Law

In *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), the United States Supreme Court held that all facts relevant to the "statutory maximum" sentence must be submitted to a jury and proved beyond a reasonable doubt. The "statutory maximum" was defined as the maximum

penalty permitted under applicable sentencing provisions, *based solely on the facts reflected in the jury verdict,* rather than the sentence that might be imposed based upon additional facts found by the sentencing court. *Blakely,* 124 S.Ct. at 2536-37, 2539 (emphasis in original). It is of little import "[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it" where "the verdict alone does not authorize the sentence." *Blakely,* 124 S.Ct. at 2538 n.8 (emphasis in original).

In *Blakely,* the issue of whether the defendant had acted with "deliberate cruelty," the fact upon which the trial judge had relied to increase the defendant's sentence, had not been submitted to the jury or proved beyond a reasonable doubt. By imposing a term of imprisonment based on this finding beyond the base range prescribed by Washington's sentencing provisions, the trial judge had violated the defendant's rights to a jury trial and proof beyond a reasonable doubt.[1]

In *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), the Court held that the United States Sentencing Guidelines ("USSG") violate a defendant's constitutional rights in two ways. First, the Act violates Sixth Amendment rights, because it requires *judges,* not juries, to decide facts that affect the maximum sentences to which defendants are exposed. Second, it violates Fifth Amendment rights, because it requires judges to find those facts by *a preponderance of the evidence,* rather than "beyond a reasonable doubt," and does not limit the sentence calculation to facts alleged in the indictment. In other words, the constitutional rights recognized in *Blakely* are both applicable and consistent with a constitutional federal

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[1] The right to proof beyond a reasonable doubt is encompassed within both the Fifth and Fourteenth Amendment Due Process Clauses and applies with equal vitality in both state and federal criminal actions. *In re Winship*, 397 U.S. 358, 364 (1970).

sentencing scheme.

Prior to *Booker,* 18 U.S.C. 3553(b)(1) required a judge to impose a sentence within the guidelines unless additional facts were found by the court, and required the applicable guideline range to be determined and thus increased, enhancement by enhancement, on the basis of non-jury fact-finding. In *United States v. Fanfan,* 543 U.S. 220, 125 S.Ct. 738 (2005), the majority applied a severance analysis to determine that the proper judicial remedy for this unconstitutionality is not to strike down the entire statutory scheme (including the guidelines), and not to engraft additional protective procedures onto the present scheme (e.g., jury trial of guideline enhancements), but rather to "excise" the particular provisions of the statute which it found to create the unconstitutionality.

Fanfan leaves in place, as the binding law of federal sentencing, principally section 3553(a) of title 18 (as well as section 3553(c) and section 3742(f), most importantly). That means that the judge, at sentencing, is obligated to impose the sentence which is ***"sufficient but not greater than necessary"*** *to* achieve the broad social purposes of sentencing described in section 3553(a)(2). The sentence which is minimally sufficient to serve its public purposes is what the law demands now, and the statute makes quite clear that this sentence is not necessarily or even presumptively a guideline sentence. The guidelines have not been made "advisory" in the sense of being the sole reference point or even the beginning point for the judge's exercise of discretion.

On April 6, 2005, the Sixth Circuit decided the case of *United States v. Webb*, 403 F.3d 373 (6th Cir. 2005). The *Webb* court held:

> [W]e read *Booker* as instructing appellate courts in determining reasonableness to consider not only the length of the sentence but also ***the factors evaluated and the procedures employed*** by the district court in reaching

> its sentencing determination. Thus, we may conclude that a sentence is unreasonable when the district judge fails to "consider" the other factors listed in 18 U.S.C. 3553(a), and instead simply selects what the judge deems an appropriate sentence without such required consideration. *Booker*, 125 S. Ct. at 757...

Id. at 383.

18 U.S.C. 3553(a) and Interpretation of the Statute

The factors in 18 U.S.C. 3553(a) include in pertinent part:

(a) (1) – the nature and circumstances of the offense and the history and characteristics of the defendant.

(a) (2) – the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(a) (3) the kinds of sentences available;

(a) (4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines....

(a) (5) any pertinent policy statement -....

(a) (6) the need to avoid unwarranted sentence

disparities among defendants with similar records who have been found guilty of similar conduct; and

(a) (7) the need to provide restitution to any victims of the offense.

When judges factor into a sentence the best way to provide a defendant with needed rehabilitation, as required by 3553(a)(2)(D), they are at the same time required to "recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. 3582(a). After *Blakely* and *Booker*, a sentence must be "reasonable" – a "concept of flexible meaning, generally lacking precise boundaries." *United States v. Webb*, 403 F.3d 373 (6th Cir. 2005).[2] Thus, reasonableness is when a judge considers the factors listed in 18 U.S.C. 3553(a) rather than simply selecting what the judge deems an appropriate sentence without such required consideration." *Webb, supra.*

The *Booker* decision allows trial courts to consider factors which the guidelines previously precluded a court from considering, such as a defendant's age, education and vocational skills, mental and emotional condition, physical condition, family ties and responsibilities, socio-economic status and any other factors that make each human being and each case unique. *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005). See also, 18 U.S.C. 3661 which specifies that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

[2] If "reasonableness" were equated with a Guideline sentence, such a standard "would effectively reinstitute mandatory adherence to the Guidelines" that was condemned in *Blakely*. *Webb, supra*, citing *United States v. Crosby*, 397 F.3d 103, 115 (2nd Cir. 2005).

In determining whether a sentence is minimally sufficient to comply with the 3553(a)(2) purposes of sentencing, the court must consider several factors listed in 3553(a)(1-7).[3] It is Petitioner's contention that the trial court did not accord the proper weight to these factors and did not consider some of the factors at all in determining the appropriate sentence.

More recently, in the case of *United States v. McBride,* 434 F.3d 470 (6th Cir. 2006), the Sixth Circuit addressed the current legal framework applicable to federal criminal sentencing which has evolved from the decision of the United States Supreme Court in *United States v. Booker,* 543 U.S. 220 (2005). The *McBride* Court held that while ritualistic incantation of the 3553(a) factors is not required, "the district court's opinion should be sufficiently detailed to reflect the considerations listed in Section 3553(a)." *Id.* at 474. "A district court's failure to explicitly consider the section 3553(a) factors without other evidence in the record demonstrating that they were thoroughly considered by the district court would result in a procedurally unreasonable sentencing determination requiring us to vacate and remand for resentencing." *Id.* at 476. In the instant case, the District Court did not properly consider all of the 3553(a) factors, did not consider many of Petitioner's arguments, and did not consider the documentary evidence submitted by Petitioner. All of the foregoing deprived Petitioner of due process of law.

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[3] These directives often conflict with the kinds of sentences previously required by the guidelines which in most cases offered little alternatives to prison, even though in some cases, a defendant's education, treatment or medical needs may be better served by a sentence which permits the offender to remain in the community.

REASONS FOR GRANTING THE PETITION

This case was not the typical wire fraud case. Petitioner was in his sixty's when the loan transactions took place. Petitioner submitted documents to Midbanc containing accurate information about him and where he lived. He never sought to hide his identity. Attached to his sentencing memorandum, Petitioner submitted numerous pieces of evidence that proved he had every intent to restore the cars, show them, and resell them for profit, thus allowing him to fully repay the loans. In fact, as soon as he received the loans, he repaid the two persons he bought the cars from with the loan proceeds. The Government agreed that Petitioner had every intention to repay the loans.

At the time of sentencing, Petitioner was seventy-two years old, had recently lost his wife to cancer, had a son with mental health problems, and Petitioner himself was not in good health. He was no threat to society. Despite the unique nature of the case, the District Court failed to consider the documents attached to the sentencing memorandum in determining a reasonable sentence. Instead, the District Court relied upon one paragraph from the presentence report that alleged Petitioner had a similar conviction seventeen years prior to sentencing.

Review by this Court is necessary because the trial court's sentence, and the Sixth Circuit's decision, in this matter are contrary to the *Blakely* and *Booker* decisions. The trial court failed to impose a reasonable sentence pursuant to 18 USC § 3553(a) and refused to consider the wealth of documents submitted by the defense that supported a non-incarceration sentence. The Sixth Circuit failed to adhere to its own precedent in its review. Accordingly, Petitioner respectfully submits that review by this Court is needed now to clarify what a district court must do in determining an appropriate sentence. This Court's decision will impact countless sentencing hearings across the country.

A. The Trial Court Did Not Accord The Proper Weight To The Factors Listed In 18 U.S.C. § 3553(A), Failed To Consider Documents Submitted By Petitioner, And Gave Undue Deference To The Presentence Report

The District Court did not adequately consider the documentary evidence submitted in support of Petitioner prior to his sentencing. This was not character type evidence. It was evidence that proved this was a different type of case and warranted a different type of sentence. The trial court never mentioned any of the numerous affidavits submitted by Petitioner and whether they were even considered in determining the appropriate sentence. There is no statement that the documents were rejected and the reasons for such refusal to accord any weight to them. There is no mention made that the Court considered and rejected affidavits or correspondence from: Jeff Weinstein, Richard Sberlati, Edward Rini, Martin Dorfman, Michael Canyon, Frank Stewart, Rita Stewart, Glen Rowan, and Charles Hochbaum. App., *infra*, 36a-54a. In a post-*Booker* world, this was an error. It is unclear how a sentence can be reasonable when the multitude of documents submitted by Petitioner were not considered or mentioned in any way by the trial court in imposing sentence.

In *United States v. McBride,* 434 F.3d 470 (6th Cir. 2006), the Sixth Circuit addressed the current legal framework applicable to federal criminal sentencing which evolved from the decision of this Court in *United States v. Booker,* 543 U.S. 220 (2005). The *McBride* Court held that while ritualistic incantation of the 3553(a) factors is not required, "the district court's opinion should be sufficiently detailed to reflect the considerations listed in Section 3553(a)." *Id.* at 474. Moreover, "[a] district court's failure to explicitly consider the section 3553(a) factors without other evidence

in the record demonstrating that they were thoroughly considered by the district court would result in a procedurally unreasonable sentencing determination requiring us to vacate and remand for resentencing." *Id.* at 475-76 & n.3.

The *Webb* Court held that a sentence was unreasonable when the trial court failed to consider the other factors listed in 18 U.S.C. 3553(a). *Webb*, 403 F.3d at 383. *McBride* held that the failure of the district court to explicitly consider the 3553(a) factors without other evidence that they were thoroughly considered would result in an unreasonable sentence requiring remand to the district court. *McBride*, at 474, n. 3. Thus, the case law from the Sixth Circuit suggests the District Court's sentence in this case was unreasonable.

The District Court seemed most concerned with the allegation from the presentence report (PSR) that Petitioner had committed a similar offense. This is precisely the problem alluded to in *Blakely* where the Court condemned enhancements of guideline sentences not "based on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong..." *Blakely* 124 S.Ct. at 2542.

The case referred to by the District Court from the PSR occurred seventeen years prior to Gale's sentencing on the instant case. The major difference in the instant case is that Petitioner had every intention of paying back the loan in this case. He did everything to prepare for the cars: obtaining insurance, a garage to house and restore them, a mechanic to work on them, arranging for their transport, and providing truthful information about himself and where he lived. The trial court's reliance on the 1988 case was improper and resulted in a sentence that was unreasonable.

The District Court did not consider all the factors required under 18 U.S.C. 3553(a). This fact by itself warrants the case being remanded to the District Court for resentencing.

In addition, Petitioner submitted numerous documents with his sentencing memorandum that supported his arguments. The District Court did not mention consideration of any of the documents in determining a reasonable sentence. A summary of some of the documents submitted and not addressed by the District Court include: Affidavit of Ed Rini regarding Gale's payment of fees to secure garage space and order parts as well as the value of the cars; various checks paid to persons and agencies for down payments and insurance payments for the cars; certificate of judgment showing $100,185 payment to Airinhos and Marilena Serradas; and Gary DeTrano's bankruptcy petition showing Midbanc and Petitioner as creditors; evidence of Petitioner's involvement as a classic car collector; evidence of others who have had positive dealings with Petitioner and problems dealing with Gary DeTrano; evidence of the problems with Petitioner's son and Petitioner's health issues.

As can plainly be seen from the record, when weighing the crime itself, the intent of Petitioner to pay the loan back which was not disputed, and what Petitioner has been through as a result of his actions and through the passage of time, a sentence of incarceration is unreasonable as contemplated under 18 U.S.C. 3553(a). The District Court did not undertake an appropriate 18 USC 3553(a) review.

In order to determine whether a reasonable sentence was imposed, a district court must consider and address the evidence before it. If the Sixth Circuit's decision is permitted to stand, trial court's will have no duty to do anything but to give a ritualistic incantation that they have considered the 18 U.S.C. 3553(a) factors even if there is no evidence to support such a conclusion. Petitioner asks this Court to either sua sponte remand this case for resentencing or to grant the petition and provide some certainty on this important issue facing all criminal defendants sentenced in federal court.

B. The Sixth Circuit Decision Is Inconsistent With Its Own Precedent And With *Blakely V. Washington* And *United States V. Booker*

In imposing the sentence in this matter, the District Court stated:

> In this case I have weighed all of those under 3553(a) and have carefully reviewed the memoranda that have been filed...
>
> But as I said earlier, ... one of the factors that I am required to consider and give weight to, along the other factors, is the history and characteristics of the defendant. And I have already described that this actually is virtually a copy of the previous offense, doing the same thing, making a fraudulent application for a loan in order to acquire vintage Cadillac automobiles. In other words, it's not he first time Mr. Gale has done that kind of fraud. He's committed a number of frauds based on his criminal history. It's not the first time he has committed fraud in obtaining a loan to purchase or acquire vintage automobiles.
>
> ***
>
> After considering the factors to be considered in proposing a sentence as set forth in 18 U.S.C. § 3553(a), including an application of the advisory sentencing guidelines, and considering the facts of this particular case and after a careful review of the presentence investigation report, I have concluded that a reasonable sentence is the one that I have imposed. It happens to be a sentence within the imprisonment range of

> the sentencing guidelines after considering any basis for a departure upward or downward from that guideline range.
>
> It is not, however, based solely on the sentencing guidelines. I have considered those to be simply one of seven factors that I must consider.
>
> I also believe that the sentence is sufficient, but not greater than necessary, to:
>
> Reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> To afford adequate deterrents to criminal conduct;
>
> To protect the public from further crimes of the defendant; and
>
> To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

App., *infra*, 28a-31a.

In affirming the District Court, the Sixth Circuit's opinion in this case is inconsistent and contrary to other decisions issued by the court. The opinions of the Sixth Circuit on what is a reasonable sentence vary widely and give judges, defendants and prosecutor's alike, no idea of what is or is not a reasonable sentence. Previous opinions of what is a reasonable sentence were not followed in Petitioner's case.

The Sixth Circuit is guided, as are all circuits, by *Booker's* standard of appellate review for reasonableness and the sentencing goals of § 3553(a). Thus, a sentence that falls within the Guidelines range is viewed with a "rebuttable presumption of reasonableness." *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006). "This rebuttable presumption does not relieve the sentencing court of its

obligation to explain to the parties and the reviewing court its reasons for imposing a particular sentence." *United States v. Richardson*, 437 F.3d 550, 554 (6th Cir. 2006). A district court "'must articulate its reasoning sufficiently to permit reasonable appellate review, specifying its reasons for selecting' the specific sentence in that range." *Id.*, quoting *Williams*, 436 F.3d at 709. The opinion must be "sufficiently detailed to reflect the considerations listed in Section 3553(a)." *United States v. McBride*, 434 F.3d 470, 474 (6th Cir. 2006).

In *Webb*, the Sixth Circuit held that "a sentence is unreasonable when the district judge ... neglects to 'consider' the other factors listed in 18 U.S.C. § 3553(a), and instead simply selects what the judge deems an appropriate sentence without such required consideration." *Id.* at 383, citing *Booker*, 125 S.Ct. at 757. For the reasons stated in the previous section, there is no evidence in the record that the District Court considered the other factors or why those factors were rejected. Pursuant to its own precedent gleaned from the *Booker* analysis, the Sixth Circuit should have remanded Petitioner's case for resentencing.

The *Webb* Court also found a sentence is unreasonable if a court gives an unreasonable amount of weight to any pertinent factor. *Id.* at 385; *United States v. Collington*, 461 F.3d 805 (6th. Cir. 2006). In the instant case, the District Court gave more weight than anything in its decision to a single paragraph from the presentence report which gave few facts regarding a dissimilar prior conviction from 1988. The Sixth Circuit opined that perhaps Petitioner should have provided sworn statements that the old case was not the same as the new one. *Gale*, 468 F.3d at 938. Until the sentencing hearing, Petitioner had no idea that the District Court would make such a huge issue of something that was not similar at all to the instant case. It was only at the time the trial court imposed its sentence that it gave any indication that a 1988 case would have such an impact on sentencing. The Sixth

Circuit should have at the very least remanded the case to allow Petitioner to present the evidence it suggested. Failing to do so is contrary to Sixth Circuit precedent.

In *United States v. Foreman*, 436 F.3d 638 (6th Cir. 2006), the Sixth Circuit reaffirmed the holding in *Williams* but cautioned courts against giving too much weight to a guideline sentence. The presumption of reasonableness given a guideline sentence "is rather unimportant." *Id.* at 644. "A sentence within the Guidelines carries with it no implication that the district court considered the 3553(a) factors if it is not clear from the record..." *Id.* The *Foreman* Court also opined that a sentence is not reasonable if there "is no evidence that the district court followed its statutory mandate to 'impose a sentence sufficient, but not greater than necessary' to comply with the purposes of sentencing found in 3553(a)(2)." *Id.*

In this case, the Sixth Circuit essentially held that due to the presumption of reasonableness, Petitioner had to prove the sentence was unreasonable. *Gale*, 468 F.3d at 937. This holding is contrary to the holdings of *Webb*, *McBride*, and *Foreman*, which hold that it is the district court's obligation to consider the 3553(a) factors. The district court must also set forth reasons why its sentence is sufficient but not greater than necessary to comply with the purposes and principles of sentencing. The District Court's opinion in this case is defective for these very reasons and the Sixth Circuit's opinion is contrary to its own precedent and to both *Blakely* and *Booker*.

Moreover, the sentence in this case is contrary to the Sixth Circuit's opinion in *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006). The *Richardson* Court indicated that a district court must "communicate clearly its rationale for imposing the specific sentence." *Id.* at 554. Additionally, "where a defendant raises a particular argument in seeking a lower sentence, the record **must** reflect both that the district judge considered the defendant's argument and that the

judge explained the basis for rejecting it." *Id.*; *see also United States v. Vonner*, 452 F.3d 560 (6th Cir. 2006). (emphasis added). The record in this case is utterly devoid of evidence that the District Court considered and rejected the arguments made by Petitioner or the exhibits supporting his arguments. The District Court did not communicate clearly its reasons for imposing the sentence. The Sixth Circuit held: "**As for the arguments the district court did not expressly address, it was not required to do so.**" *Gale*, 468 F.3d at 940. Apparently, the Sixth Circuit either rejected its previous opinions or failed to follow and apply them in Petitioner's case.

In the instant case, the District Court merely provided a perfunctory explanation that it believed eighteen months imprisonment was a reasonable sentence in light of the § 3553(a) factors. The District Court did not offer an explanation as to why it discredited Petitioner's argument, including the documents, in support of a lower sentence. This failure to provide an adequate explanation is a violation of the Sixth Circuit's precedent. The Sixth Circuit erred in not remanding this case for resentencing.

If the District Court approached the sentencing without the proper view of the post-*Booker* sentencing analysis, it throws the entire sentence into question. The District Court's statements at sentencing are in direct conflict with many of the Sixth Circuit's recent holdings and alone are grounds for remand.

The District Court made no mention of the many arguments presented by Petitioner or myriad of documents supporting his claims. Other than brief statements, the District Court provides little affirmative indication that it considered all of the relevant sentencing factors and evidence when it sentenced Petitioner. In the Sixth Circuit's own words, "[w]hen, on appeal, a defendant's argument and supporting evidence presents an arguably meritorious claim for a lesser sentence, but there is little to suggest that the

district court actually considered it, then remand may be appropriate." *Id.*, citing *United States v. Cunningham*, 429 F.3d 673, 679-680 (7th Cir. 2005).

The Sixth Circuit's inconsistent application of this Court's holdings in *Blakely* and *Booker* are causing wildly different sentences. While it may take some time for the law to develop, litigants should be able to rely upon previous decisions in determining what a district court is required to do in order for a sentence to be reasonable. The Sixth Circuit did not apply its own precedent to Petitioner's case. If it had done so, Petitioner's case would have been remanded for resentencing consistent with the opinions of this Court in *Blakely* and *Booker* as interpreted by the Sixth Circuit in its earlier opinions. Having failed to properly apply the aforementioned precedent, Petitioner's case should be remanded for resentencing.

As the highest court in the land, this Court must resolve the ever growing conflict not only among the circuit courts of appeal but within the circuit's themselves. This case is but one of many examples of what will continue to happen if this Court does not intervene and set firm rules on what a district court must say, do and consider before a sentence can be considered reasonable pursuant to 18 U.S.C. § 3553(a).

CONCLUSION

For the foregoing reasons, Petitioner Algis J. Gale respectfully requests the Court grant the petition for a writ of certiorari to allow further briefing on the issues raised herein or to remand this matter to the United States District Court for resentencing.

Respectfully submitted,

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February 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-4204
UNITEDS STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

ALGIS J. GALE, DEFENDANT-APPELLANT

Argued September 14, 2006
Decided November 20, 2006

Appeal from the United States District Court for the Southern District of Ohio at Columbus, Case No. 01-00048 – Judge John D. Holschuh, Sr. District Judge

McKeague, Circuit J.

Defendant-Appellant Algis J. Gale appeals his sentence for wire fraud involving car loans. He takes aim at the district court's sentencing-range calculation under the United States Sentencing Guidelines ("U.S.S.G." or the "Guidelines")[1] as well as its consideration of the remaining sentencing factors under 18 U.S.C. § 3553(a). He also argues

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[1] The District used the 1995 version of the Guidelines manual.

that he should not have to pay restitution, or, alternatively, that the amount ordered was too high.

For the reasons stated below, we affirm Gale's sentence.

I.

Midbanc Lease, Inc. ("Midbanc") locates financing for individuals purchasing collector automobiles. In March 1996, Gale contacted and represented to Midbanc president and owner Patricia McClintick that he and his associate, Airinhos Serradas, were interested in obtaining financing for vintage Cadillacs they wanted to purchase. Gale provided Midbanc with a completed credit application and various tax records. Gary DeTrano, among others, was listed as a personal reference. All of Midbanc's contacts with Gale were by telephone, facsimile, and Federal Express.

With Midbanc's assistance, Gale obtained two loans from Key Bank of Ohio for the purchase of a 1946 Cadillac and 1947 Cadillac. Gale indicated that the purchase price for each vehicle was $35,000 and he would be placing a total down payment of $10,000, leaving a loan amount for each vehicle of $30,000.

After the loans were approved, Gale provided Midbanc with consumer notes signed by himself and (purportedly) Serradas. Midbanc received the funds from Key Bank and forwarded them to Gale.

Serradas eventually learned that Gale had used his name to obtain the loans. He denied any knowledge of purchasing and obtaining financing for the two Cadillacs. Serradas also denied signing any documents regarding the financing obtained for the classic cars. Under the terms of Midbanc's agreement with Key Bank, Midbanc had to pay Key Bank the $60,000 for the amount of money loaned to Gale.

Subsequent investigation revealed the bills of sale submitted to Midbanc by Gale were fraudulent. The bill of

sale for the 1946 Cadillac listed the purchase price as $35,000 when the actual purchase price was $15,000. Additionally, with respect to the 1947 Cadillac, the purchase price was $17,000, not $35,000 as listed. Midbanc stopped the shipment of the two Cadillacs from California to New York, took possession of the vehicles, and subsequently sold them together for $20,000 to a third party.

In 2001, the Government indicted Gale on two counts of wire fraud and one count of mail fraud in connection with the failed loan transaction. He pleaded guilty to one count of wire fraud; the other two counts were subsequently dismissed. The district court held a sentencing hearing in June 2005. It adjourned the hearing to give the parties time to gather additional evidence of any repayments Gale might have made to Midbanc.

The hearing resumed in August. After reviewing the various memoranda and reports filed by the parties and hearing testimony and counsels' arguments, the district court issued its ruling:

> In this case I have weighed all of those factors under [18 U.S.C. §] 3553(a) and have carefully reviewed the memoranda that have been filed . . . . [A]s I said earlier, one of the factors that I am required to consider and give weight to, along with the other factors, is the history and characteristics of the defendant. And I have already described that history and characteristics, and I have also described that this actually is virtually a copy of the previous offense, doing the same thing, making a fraudulent application for a loan in order to acquire vintage Cadillac automobiles. In other words, it's not the first time Mr. Gale has done that kind of fraud. He's committed a number of frauds based on his criminal history. It's not

the first time he has committed fraud in obtaining a loan to purchase or acquire vintage automobiles.

For the previous offense he received, as I recall, a minimum of 18 months. I think I would be perfectly justified under all of the circumstances in this case to impose a sentence of far more than 18 months. But I have considered all of these factors, including Mr. Gale's age, and I don't intend to impose a sentence greater than 18 months.[2]

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Algis Julius Gale, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 18 months.

* * *

After considering the factors to be considered in proposing a sentence as set forth in 18 U.S.C. 3553(a), including an application of the advisory sentencing guidelines, and considering the facts of this particular case and after a careful review of the presentence investigation report, I have concluded that a reasonable sentence is the one that I have imposed. It happens to be a sentence within the imprisonment range of the sentencing guidelines after considering any basis for a departure upward or downward from that guideline range.

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[2] The district court had earlier calculated the advisory Guidelines range as eighteen to twenty-four months of imprisonment.

> It is not, however, based solely on the sentencing guidelines. I have considered those to be simply one of seven factors that I must consider.
>
> I also believe that the sentence is sufficient, but not greater than necessary,
>
> to:
>
> Reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> To afford adequate deterrents to criminal conduct;
>
> To protect the public from further crimes of the defendant; and
>
> To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In addition to imprisonment, the district court sentenced Gale to three years of supervised release and restitution of $28,982.06.

Gale timely appealed his sentence.

II.

A. *Post*-Booker *Sentencing in General*

Title 18 U.S.C. § 3553(a) requires the district court to consider the following factors in fashioning a defendant's sentence:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for –
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .;
>
> (5) any pertinent policy statement . . .;
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

Under the post-*Booker*[3] sentencing regime, a district court must impose "'a sentence sufficient, but not greater than necessary to comply with the purposes' of § 3553(a)(2)." *United States v. Cage*, 458 F.3d 537, 540 (6th Cir. 2006) (quoting *United States v. Foreman*, 436 F.3d 638, 644 n.1 (6th Cir. 2006)).

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[3] *United States v. Booker*, 543 U.S. 220 (2005).

On appellate review, we review a sentence for "reasonableness."[4] As explained in *United States v. Jones*,

> The district court must articulate the reasons for the particular sentence imposed in order to enable this Court to engage in a meaningful reasonableness review of the sentence. *United States v. Jackson*, 408 F.3d 301, 305 (6th Cir. 2005) (finding reasonableness review impossible where the district court provided a list of characteristics of the defendant that it considered at sentencing, without any accompanying analysis, and did not reference the applicable Guidelines provisions); *see also United States v. James Williams*, 432 F.3d 621, 623-24 (6th Cir. 2005) (affirming the district court's decision to depart downward where the district court, in following the framework established in *Jackson*, considered the applicable Guidelines range and provided a detailed analysis in support of its decision to depart). This Court has determined that a reasonableness review contains both substantive and procedural components. [*United States v.*] *McBride*, 434 F.3d [470,] 475 n. 3 [(6th Cir. 2006)] (citing *United States v. Webb*, 403 F.3d 373, 383-85 (6th

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[4] In its ruling, the district court concluded that a "reasonable" sentence was the one it imposed. The overall reasonableness of the sentence is an appellate standard, not one for the sentencing court to employ. *See, e.g., Cage*, 458 F.3d at 541. As explained *infra*, however, the district court considered the relevant sentencing factors in applying its "independent judgment" to fashion a sentence for Gale. Thus, the district court's reference to the reasonableness of the sentence does not impair its validity. *United States v. Cruz*, 461 F.3d 752, 754-55 (6th Cir. 2006).

> Cir. 2005)). We must consider, therefore, the length of the sentence as well as "the factors evaluated and the procedures employed by the district court in reaching its sentencing determination." *Webb*, 403 F.3d at 383.

445 F.3d 865, 869 (6th Cir.), *cert. denied*, 2006 WL 2049837 (U.S. Oct. 2, 2006) (No. 06-5395). While "[t]he district court need not explicitly reference each of the § 3553(a) factors in its sentencing determination," "there must be sufficient evidence in the record to affirmatively demonstrate the court's consideration of [these factors]." *Id.* (internal quotations omitted).

If this court concludes that the sentence is reasonable, it must affirm. *Cage*, 458 F.3d at 540. If, on the contrary, it finds the sentence either procedurally or substantively unreasonable, it must reverse and remand for resentencing. *United States v. William Davis*, 458 F.3d 491, 495 (6th Cir. 2006).

B. *Section 3553(a)(4) – The Guidelines*

Although the Guidelines are now advisory, rather than mandatory, the district court must still consider the Guidelines in fashioning a defendant's sentence, and must construe them correctly in doing so. 18 U.S.C. § 3553(a)(4)(A); *Jones*, 445 F.3d at 869. "Legal conclusions regarding the application of the Guidelines are reviewed *de novo*." *Foreman*, 436 F.3d at 640 (citing *United States v. Gregory*, 315 F.3d 637, 642 (6th Cir. 2003)). The district court's findings of fact on sentencing, however, "will not be set aside unless clearly erroneous." *United States v. Gardner*, 417 F.3d 541, 543 (6th Cir. 2005) (citing *United States v. Walton*, 908 F.2d 1289, 1300-01 (6th Cir. 1990)).

1. *Base Offense Level and Loss Incurred*

Gale argues that the district court incorrectly calculated the amount of loss attributable to the criminal fraud. He agrees that the proper base level for his offense is six, and he also agrees that the district court started with the correct amount – $60,000. He maintains, however, that the court failed to consider the amounts he paid for the cars – $17,500 and $15,000.[5] Instead, the district court offset the $60,000 loan with the amount for which Midbanc actually sold the cars – $20,000 total. Thus, Gale argues that the intended loss was $27,500 ($60,000 minus $32,500), not $40,000, and his offense level should have only been increased four, rather than six, points.

This argument suffers from at least one fundamental defect – the district court actually applied only a four-point increase, not six. Under U.S.S.G. § 2F1.1(b)(1), a defendant's base offense level is increased by four points if the loss is more than $20,000, but not more than $40,000; five points if the loss is more than $40,000, but not more than $70,000; and six points if the loss is more than $70,000, but not more than $120,000. Applying this section, the district court increased Gale's offense level by four points, based on the actual loss of $40,000. Even if Gale is correct that $27,500 is the proper loss figure, he would still remain in the "$20,000 to not more than $40,000" loss range, which requires a four-point increase.

Gale also takes issue with the commercial reasonableness of Midbanc's mitigation efforts. He points to a potential buyer who purportedly made several offers to purchase the cars, the largest one being $50,000 for both Cadillacs. Gale

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[5] Gale also identifies approximately $10,500 in various fees and expenses he allegedly incurred in anticipation of getting the cars. He does not suggest, however, that Midbanc could have somehow recouped this amount when it sold the cars.

maintains that Midbanc should have contacted him to determine whether he could rectify the problem before it sold the cars.

The district court correctly rejected this argument. Under note 7(b) of the commentary to U.S.S.G. § 2F1.1, "if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan." There is no mention of the "commercial reasonableness" of the institution's recovery efforts. Gale's citation to U.S.S.G. § 5K2.10(c) is inapposite, as that provision deals with victims who provoke the offense against them, which, as the Government points out and Gale does not dispute, is plainly not the case here. Assuming *arguendo* that Midbanc could have sold the cars for $50,000, this would not alter the offense-level calculation. If the intended loss exceeds the actual loss, the intended loss should be used in the offense-level calculation. U.S.S.G. § 2F1.1 cmt. n.7. Since Gale's admitted intended loss – $27,5000 – exceeds his suggested actual loss – $60,000 less $50,000 – the former figure would be used; as this figure falls within the "$20,000 to not more than $40,000" loss range, his base offense level would again be subject to a four-point increase.

2. *Criminal History*

The district court determined that Gale's criminal history placed him in Category VI. Gale maintains that the district court erroneously treated four of his past state criminal offenses as separate, rather than related, offenses. Specifically, he argues that the four offenses were: (a) part of the same course of conduct, constituting a single common scheme or plan; and (b) consolidated for purposes of sentencing. Had the district court treated the four offenses as

related, Gale's criminal history would have placed him in Category V.

Under U.S.S.G. § 4A1.1(a), a defendant receives three criminal history points "for each prior sentence of imprisonment exceeding one year and one month." Under U.S.S.G. § 4A1.2(a)(2), "[p]rior sentences imposed in unrelated cases are to be counted separately," while such sentences "imposed in related cases are to be treated as one sentence." On the question of whether cases are "related," application note 3 provides:

> Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing.

Gale admitted before the district court that the four offenses were separated by intervening arrests. Under the first portion of note 3, that is the end of the inquiry. "Only if there was no intervening arrest may the court consider the factors that may 'otherwise' render prior sentences 'related.'" *United States v. Gorostieta*, 134 F. App'x 802, 804 (6th Cir. 2005) (unpublished) (citing *United States v. Bradley*, 218 F.3d 670, 673 (7th Cir. 2000)). Because he was arrested for

one offense prior to committing another one, he cannot argue that the offenses were "otherwise" related.[6]

3. *Attempt v. Completed Criminal Act*

Gale next argues that his criminal conduct is more appropriately characterized as an attempted, rather than completed, act. According to him, because he never received the cars, he believed the loan transaction was not complete. He relies upon U.S.S.G. § 2X1.1, which provides for a three-level decrease in the base-offense level for attempted (versus completed) criminal acts.

U.S.S.G. § 2X1.1(b)(1) states as follows:

> If an attempt, decrease by 3 levels, *unless* the defendant *completed all the acts* the defendant believed necessary for successful completion of the *substantive offense* or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.

(emphasis added).

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[6] Even if he could get past the intervening arrests, Gale has failed to present sufficient evidence of a common scheme or plan or consolidated sentences. Other than his attorney's assertion that the indictments "were related and alleged to be part of a common scheme or plan," there is no evidence that the offenses were "jointly planned or the commission of one offense necessarily requires the commission of the other." *United States v. Hazelwood*, 398 F.3d 792, 797 (6th Cir. 2005) (citing *United States v. Irons*, 196 F.3d 634, 638 (6th Cir.1999)). For example, one of his arrests was for perjury that occurred on June 16, 1981. His next arrest was for grand larceny, possession of a check with a forged certification on December 17, 1981. There is no obvious connection between these two offenses, and Gale has failed to connect them with evidence in the record. It is Gale's burden to show the relatedness of the offenses, *Hazelwood*, 398 F.3d at 797, and he has failed to do so.

As recounted above, Gale pleaded guilty to wire fraud, not grand theft, fraudulent receipt of property, or some other theft-based offense. The offense of wire fraud is set out in 18 U.S.C. § 1343:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.[7]

"To convict a defendant of wire fraud, the government must prove '(1) a scheme or artifice to defraud; (2) use of interstate wire communications in furtherance of the scheme; and (3) intent to deprive a victim of money or property.'" *United States v. Daniel*, 329 F.3d 480, 485 (6th Cir. 2003) (quoting *United States v. Prince*, 214 F.3d 740, 747-48 (6th Cir. 2000)).

Regardless of whether Gale was able to complete his overall scheme of receiving the cars with fraudulently obtained loan proceeds,"[s]uccess of [that] scheme is not an element of the crime." *United States v. DeSantis*, 237 F.3d 607, 613 (6th Cir. 2001). The Government set out the operative facts of Gale's wire fraud in the indictment. Gale admitted that the indictment accurately reflected his acts. He does not argue that he did not complete, or did not believe he

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[7] Congress increased the maximum term of imprisonment to twenty years under § 903(b) of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

completed, the facts set out in the indictment. As those facts are sufficient to constitute the completed act of wire fraud, the district court properly denied his request for a three-level reduction under U.S.S.G. § 2X1.1(b).

4. *Request for Downward Departure*

Gale claims that the district court erred in denying his request for a downward departure. In determining whether the district court correctly calculated the advisory Guidelines sentencing range, we do "not have authority to review the district court's decision not to depart downward." *Jones*, 445 F.3d at 868 (discussing *United States v. Puckett*, 422 F.3d 340, 346 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 1935 (2006)). The sole exception is where "the district court was not aware of or did not understand its discretion to make such a departure." *Id.* (quoting *Puckett*, 422 F.3d at 344). Here, the record reflects that the district court understood it had the discretion to depart downward. Accordingly, we cannot review the lower court's refusal to depart under the Guidelines. As explained in *Jones*, however, we can consider the bases for the underlying requests within the framework of our review of the remaining § 3553(a) factors, which we take up next. 445 F.3d at 868-69.

C. *Non-Guidelines Sentencing Factors*

In this circuit (as well as several other sister circuits), a sentence falling within the properly calculated Guidelines range is credited "with a rebuttable presumption of reasonableness." *Cage*, 458 F.3d at 541 (quoting *United States v. Williams*, 436 F.3d 706, 708 (6th Cir.), *petition for cert. filed* (U.S. July 11, 2006) (No. 06-5275)); *see also United States v. Lonnie Davis*, 458 F.3d 505, 510 (6th Cir. 2006) ("Within-Guidelines sentences such as Davis's are

afforded a rebuttable presumption of reasonableness." (citing *Williams*)); *William Davis*, 458 F.3d at 496 ("When the district court issues a within-guidelines sentence – when the independent views of the sentencing judge and the Sentencing Commission align – we apply a presumption of reasonableness to the sentence." (citing *Williams*)). As the district court correctly calculated the applicable Guidelines range, Gale must show that the district court made sufficient errors in applying (or failing to apply) the remaining sentencing factors such that his sentence was unreasonable, even though his sentence fell within the correctly calculated Guidelines range.

1. *Section 3553(a)(1) – Nature and Circumstances of the Offense*

Gale has steadfastly maintained that he had every intention to repay the loans. As evidence, he points to several items, including his history as an avid collector and restorer of classic cars, the various expenses he incurred preparing for the delivery of the vehicles, and the fact that he did purchase the cars with the loan proceeds. He argues that his intent to repay makes this a unique case for which a lesser sentence is appropriate under 18 U.S.C. § 3553(a)(1).

Based on defense counsel's assertion that there was no disagreement on the point that Gale had every intention to repay these loans, and the Government's acquiescence, the district court did recognize that Gale's "intention may have been good." Yet, the district court weighed against this "good intention": (a) the fact that Gale committed wire fraud; and (b) his extensive criminal history. In particular, the district court placed considerable weight on one past offense:

> Mr. Kravitz, isn't it the fact that this is the second time, as I understand it, the second time that Mr. Gale has committed virtually

> the same offense? As I read the presentence investigation report, Mr. Gale in 1988 fraudulently obtained a loan from the Essex Credit Corp. based on a forged appraisal of a 1947 Cadillac. The car's value was actually considerably less than the $36,000 in the forged appraisal. He was convicted of attempted grand theft. He made a few payments on the loan and then he issued some bad checks. But he was convicted of attempted grand theft and was sentenced to serve 18 months to 3 years. He was paroled on July 2, 1993 and discharged from parole on July 5, 1994.
>
> To me it's a remarkable thing that this present offense is virtually a mirror for the prior offense that he committed: fraudulent loan applications to obtain loans to buy vintage Cadillac automobiles, as a matter of fact the same 1947 Cadillac, or that model Cadillac. Talk about good intention to pay it back at all? This is not the first time he has done this.

Gale argues that the district court should not have placed significant weight on this 1988 offense because, unlike in that past case, here he had every intention of paying back the loan. Yet, he points to no evidence from or related to the 1988 offense to distinguish it from the present one – i.e., that he never intended to repay the 1988 loan, but did intend to repay the present one. He could have submitted, for example, sworn statements that he had not incurred similar expenses to prepare for the delivery of the Cadillac in the 1988 case. In the absence of any contrary evidence, it was certainly plausible for the district court to place greater emphasis on the similarities between the two offenses, rather than any purported differences. *See William Davis*, 458 F.3d at 496

(citing *United States v. Zapete-Garcia*, 447 F.3d 57, 59 (1st Cir. 2006) (stating that appellate review of a "chosen sentence for reasonableness" involves looking for "a plausible explanation and a defensible overall result")).

2. *Section 3553(a)(1) – History and Characteristics of the Defendant*

At the time of his sentencing, Gale had suffered through several family problems. His wife had recently died from cancer, and Gale was selling his home and trying to settle his wife's foreign estate. His son was divorcing his wife, and had suffered from poor mental health. He also claimed he suffered several health problems of his own.

The district court concluded that Gale's family and health problems did not warrant a lower sentence. Gale has not shown that this was error. Other than pointing them out, he offers little to show that his family problems were so substantial as to make his sentence unreasonable, especially in light of his extensive criminal background. He cites no case law in support of his position. In *Cage*, this court affirmed a defendant's sentence of thirty-seven months incarceration. 458 F.3d at 544. The defendant had argued that her sentence was unreasonable, in part, because of its likely impact on her family, including her young children. *Id.* at 539, 544. We noted that the district court fully considered the effect the sentence would have on the defendant's family, and concluded that the sentence was reasonable. *Id.* at 544.

Here, Gale's wife was deceased at the time of sentencing. While her death is, of course, unfortunate, his imprisonment will obviously not be a burden to her, as it would have if she were still alive and suffering from cancer. While he may be suffering significant grief, he does not suggest or otherwise explain why such grief is an adequate reason for a lesser sentence. Likewise, while his son may be struggling with

mental health problems, Gale has offered no evidence or other reasoned basis to suggest that his son will be significantly burdened by his father's imprisonment for eighteen months. As noted in *Cage*, "tragedy is a regular consequence of criminal conduct," both for the victims and the defendant's own family. *Id.* at 539.

As for his own health, Gale refers to current problems with high-blood pressure, as well as his prostate and eyes. Yet, most of the medical records he submitted referred to his wife's health problems. The only medical record related to his own health is one dated April 6, 2004, regarding a retinal tear in the left eye, and the development of a similar tear in the right eye. There is no evidence in the record that Gale suffers from any serious medical condition for which he could not receive adequate treatment in prison.

3. *Section 3553(a)(2) – Deterrence and the Seriousness of the Offense*

Gale next argues that his loss of business assets and income, coupled with his good conduct since the offense and the monies that he has had to pay, have sufficiently deterred him from committing such acts in the future. 18 U.S.C. § 3553(a)(2)(B). He maintains that he has already paid serious consequences for his offense. *Id.* § 3553(a)(2)(A). Defense counsel admitted during the sentencing hearing, however, that any purported financial problems suffered by Gale were due not only to the instant offense, but also his criminal history, the health problems of his wife, and his age.

The district court did not find any basis for finding a loss of business assets and source of income, and Gale has not shown this finding to have been made in error. As for Gale's good conduct since the offense, the district court noted that during much of this period of time, Gale was either on probation related to an earlier offense or on bond related to

the present offense. It was not unreasonable for the district court to place little weight on Gale's simply doing "exactly what he has to do" under the terms of his probation and bond.

4. *The Remaining Sentencing Factors*

In addition to what the district court did say on the record, Gale also takes issue with what the district court did not say. Specifically, he contends that there were several claims the district court failed to consider, including: (a) the commercially unreasonable sale of the cars by Midbanc, which counseled for a lesser sentence under 18 U.S.C. § 3553(a)(1) (as opposed to an adjustment under the Guidelines); (b) the need to avoid unwarranted disparity among defendants with similar records, 18 U.S.C. § 3553(a)(6); and (c) the appropriateness of a non-custodial sentence, 18 U.S.C. § 3553(a)(3). He also lists a number of documents that were not explicitly referenced by the district court, and argues that this is proof that the court did not consider them in fashioning his sentence.

We find no basis for remand on these claims. To enable us to review the reasonableness of a sentence, all we require of the district court is to "articulate[] its reasoning sufficiently to permit reasonable appellate review." *Williams*, 436 F.3d at 709. "[A] sentencing judge must explain to the parties and the reviewing court its reasons for imposing a particular sentence." *Jones*, 445 F.3d at 871. When a district court adequately explains *why* it imposed a particular sentence, especially one within the advisory Guidelines range, we do not further require that it exhaustively explain the obverse – *why* an alternative sentence was *not* selected – in every instance. *Jones*, 445 F.3d at 871; *see also United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir.) ("[W]e will not

conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced."), *cert. denied*, 2006 WL 1880550 (U.S. Oct. 2, 2006) (No. 06- 21).

Of course, there may be a case in which a district court provides little, if any, affirmative indication that it considered all of the relevant sentencing factors and evidence when it sentenced a defendant. When, on appeal, a defendant's argument and supporting evidence presents an arguably meritorious claim for a lesser sentence, but there is little to suggest that the district court actually considered it, then remand may be appropriate. *See, e.g., United States v. Cunningham*, 429 F.3d 673, 679-80 (7th Cir. 2005).

We are not faced with the latter case here. The district court clearly understood its duty to consider all of the relevant factors of 18 U.S.C. § 3553(a), not just the advisory Guidelines, in fashioning Gale's sentence. It spent considerable effort in reviewing the nature and circumstances of the offense, as well as Gale's history (especially his education and past criminal conduct) and characteristics (including his family, medical condition, and age). It also considered, and expressly rejected, Gale's argument that he has already been deterred from committing future crimes, as reflected in his good conduct since the 1996 offense.

As for the arguments the district court did not expressly address, it was not required to do so. "A sentencing judge has no more duty than we appellate judges do to discuss every argument made by a litigant; arguments clearly without merit can, and for the sake of judicial economy should, be passed over in silence." *Cunningham*, 429 F.3d at 678; *see also United States v. Cooper*, 437 F.3d 324, 329 (3d Cir. 2006) (explaining that to comply with the obligation to consider the relevant sentencing factors, a "court need not discuss every argument made by a litigant if an argument is clearly without

merit"). Gale provided no federal case law to suggest that victims of wire fraud must act in a commercially reasonable manner when trying to cut their losses. Nor did he offer sufficient evidence that Midbanc, in fact, acted commercially unreasonable. Given that he had recently defrauded the company, it was not unreasonable for it to refuse either to consider an offer from an associate of his (especially when the record reflects that the offer was made during a joint telephone call with Gale), or to seek Gale's opinion on how best to dispose of the cars.

On the need to avoid unwarranted disparity in sentencing, what Gale misses on appeal is that he took the position below that the factor was not relevant to his case. Furthermore, the Guidelines take this circumstance into account. *See United States v. Johnson*, 445 F.3d 339, 343 (4th Cir. 2006) ("[B]y devising a recommended sentencing range for every type of misconduct and every level of criminal history, the Guidelines as a whole embrace 'the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.'" (quoting 18 U.S.C. § 3553(a)(6))). As for the appropriateness of a different sentence, the district court rejected Gale's underlying arguments for a noncustodial sentence (e.g., family and health circumstances, need for deterrence) – no more was necessary for our review.

Finally, a district court need not describe in detail or list all of the documents or other evidence it considered during sentencing. It is fair to say that if an appellate court cannot rely on a lower court to do its duty by reviewing the factual record, our system of justice will collapse of its own weight. There is a presumption in the law that a district court knows and applies the law correctly, *United States v. Buchanan*, 449 F.3d 731, 741 (6th Cir.) (Sutton, J., concurring) (citing *United States v. Ayers*, 428 F.3d 312, 315 (D.C. Cir. 2005)), *petition for cert. filed* (U.S. Aug. 23, 2006) (No. 06-6155), and a similar presumption must extend to the court's factual

review of the record. Thus, without some affirmative indication in the record to the contrary (apart from the sentence imposed), we presume that a district court has reviewed the evidence provided to it. Gale has made no such affirmative showing here.

D. *Gale Received a Reasonable Sentence*

Our review of the record confirms that Gale received a procedurally reasonable sentence. As Gale has not shown that his within-Guidelines sentence is substantively unreasonable, we affirm his sentence of imprisonment.[8]

III.

As for restitution, we find no error with either the propriety or amount ordered by the district court. These two matters "are subject to different standards of review." *United States v. Johnson*, 440 F.3d 832, 849 (6th Cir.), *cert. denied*, 2006 WL 1139577 (U.S. Oct. 2, 2006) (No. 05-10617). The court "review[s] *de novo* whether a restitution order is permitted under the law. If it is, then the amount of restitution ordered is reviewed under the 'abuse of discretion' standard." *Id.* (quoting *United States v. Wood*, 364 F.3d 704, 714 (6th Cir. 2004)). Gale's arguments implicating *Booker* issues "do not apply to the district court's restitution order."

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[8] Gale also asserts a due-process violation. The Government waited several years to indict Gale. He argues that the pre-indictment delay violated his right to due process, and that the delay prejudiced his ability to develop evidence to support his arguments for a lower sentence (and restitution). The district court addressed the claim in a well reasoned decision and again rejected it during the sentencing hearing. For the reasons set forth by the district court, we find that his due-process claim is without merit.

Id. (citing *United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005)).

In general, a district court must order restitution from a defendant convicted "of an offense against property . . . including any offense committed by fraud or deceit" if an identifiable victim has suffered a loss. 18 U.S.C. § 3663A(a)(1),(c)(1). Gale does not dispute that he falls into this category. He instead reiterates his argument that Midbanc acted in a commercially unreasonable manner in selling the cars. As Gale has not shown either a legal requirement that Midbanc maximize its recovery or that the company in fact acted unreasonably, restitution was properly ordered.

On the district court's restitution calculation, Gale offers several arguments: (a) he paid an additional $10,000 to Midbanc; (b) Midbanc refused to cooperate in determining the amount of its loss; (c) he has already paid more than $100,000 related to the offense (more than the aggregate amount of the loans); and (d) his business partner, DeTrano, should have been liable for a portion of the loss. He maintains that the district court impermissibly shifted the burden of persuasion from the Government to him.

Gale's arguments are based on conjecture and are otherwise without merit. The PSR initially calculated the amount of restitution as follows:

$60,000.00 (the amount of the loans)
– $20,000.00 (the amount recouped by Midbanc)
+ $3,982.06 (administrative costs incurred by Midbanc)
– $5,000.00 (payment to Midbanc)

$38,982.06

Gale did not dispute the accuracy of these amounts, but did argue that he made additional payments to Midbanc. The

district court adjourned the sentencing hearing to give the parties additional time to gather evidence regarding the proper amount of restitution. The Government returned with evidence of an additional $10,000 paid by Gale to the victim. The district court subtracted this amount, for a total of $28,982.06.

Gale also returned with a report of payments. As the district court recounted (and defense counsel agreed), however, the payments identified by Gale were made to persons or entities other than Midbanc. The district court considered Gale's testimony and the documents he submitted, but ultimately concluded that: (a) the documents did not show additional payments to Midbanc; and (b) Gale's testimony could not be credited upon hearing his claims and viewing his demeanor on the stand. A review of the documents and Gale's testimony confirms that the district court did not abuse its discretion in rejecting Gale's claims of an additional $20,000 in payments to Midbanc.[9]

Likewise, Gale's other arguments fail. He did not assert before the district court, either in his report regarding restitution or during the sentencing hearing, that he made efforts to contact Midbanc and was rebuffed. While the Government stated in its report that it had made telephone calls to Midbanc's president after the initial hearing, but that those calls had not yet been returned, there is no suggestion that Midbanc was somehow "refusing to cooperate" with the parties. As for his claim that he has already paid more $100,000, his counsel admitted that the payment was made to satisfy a civil judgment against him by Serradas, not Midbanc. Finally, on whether DeTrano must shoulder some of the load for repaying Midbanc, it is undisputed that he was

---

[9] The district court did not shift the overall burden of persuasion to Gale. The Government presented uncontroverted evidence of $28,982.06 owed by Gale. It was his burden of rebuttal, then, to show he made additional payments. This he failed to do.

not charged or convicted of any crime involving the fraudulent loans. This distinguishes the instant case from the one cited by Gale, *United States v. Arutunoff*, 1 F.3d 1112, 1121 (10th Cir. 1993), which involved a dispute over the proper amount and apportionment of restitution between co-defendants. Here, Gale alone pleaded guilty to fraudulently obtaining the loans equaling $60,000 – thus, it is his responsibility under 18 U.S.C. § 3663A to pay restitution for that amount, as adjusted for any related expenses, payments, and recoupment.

Accordingly, there exists no sound basis for reversing the district court on its restitution order.

IV.

For the reasons stated above, we AFFIRM Gale's sentence.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 05-4204
UNITED STATES OF AMERICA

v.

ALGIS JULIUS GALE, DEFENDANT

Before: GIBBONS and McKEAGUE, Circuit Judges;
FORESTER, Senior District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the sentence imposed on defendant Algis Gale by the district court is AFFIRMED.

ENTERED BY ORDER FO THE COURT

s/ Leonard Green

Leonard Green, Clerk

APPENDIX C

UNITED STATES V. GALE

SENTENCING PROCEEDINGS BEFORE THE HONORABLE JOHN D. HOLSCHUH, UNITED STATES DISTRICT JUDGE, SITTING AT COLUMBUS, OHIO, ON WEDNESDAY, AUGUST 17, 2005

COPY OF OFFICIAL TRANSCRIPT

The following excerpt appears on pages 41-45 of the official transcript, at the close of counsels' statements, and the beginning of the court's reading of the sentence:

> THE COURT: As I have said earlier, I view my responsibility to impose a "reasonable" sentence based upon my weighing of all of the factors set forth in 18 U.S.C. § 3553(a). One of those factors, of course, is a sentencing range under the sentencing guidelines, in this case 18 to 24 months.
>
> I don't give that sentencing guideline any special deference, any special presumption. I don't believe that the -- the policy of the Attorney General may be to the contrary, I don't believe that you must follow the sentencing guidelines unless there is some extraordinary reason to depart.
>
> In this case I have weighed all of those factors under 3553(a) and have carefully reviewed the memorda filed and I might say on the record that defense counsel in this case have been extraordinarily good, their research and their brief writing and their oral arguments have been

exceptionally good and certainly in the best tradition of good advocacy.

I might say the same is true of Assistant United States Attorney Brown who is responsible for discovering the additional payments made be Mr. Gale to be applied toward the restitution requirement. But as I said earlier, I think, Mr. Kravitz will agree, as I said earlier, one of the factors that I am required to consider and give weight to, along the other factors, is the history and characteristics of the defendant. And I have already described that this actually is virtually a copy of the previous offense, doing the same thing, making a fraudulent application for a loan in order to acquire vintage Cadillac automobiles. In other words, it's not he first time Mr. Gale has done that kind of fraud. He's committed a number of frauds based on his criminal history. It's not the first time he has committed fraud in obtaining a loan to purchase or acquire vintage automobiles.

For that previous offense he received, as I recall, a minimum of 18 months. I think I would be perfectly justified under all of the circumstances in this case to impose a sentence of far more than 18 months. But I have considered all of these factors, including Mr. Gale's age, and I don't intend to impose a sentence greater than 18 months.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment that the defendant, Algis Julius Gale, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 18 months.

Upon release from imprisonment, the defendant shall serve a term of supervised release of 3 years. Within 72 hours of release from the custody of the Bureau of prison, the defendant shall report to the probation office in the district to which he is released.

While on supervised release, the defendant shall not commit any federal, state or local crimes. He is prohibited from possessing a firearm or other dangerous weapon. He shall not unlawfully posses any controlled substance.

The Court finds that reliable information exists indicating a low risk for future substance abuse on the part of the defendant. Therefore, pursuant to 18 U.S.C. § 3583(d), the Court suspends the requirement of mandatory blood testing.

The defendant shall comply with the standard conditions of supervised release adopted by this Court.

The defendant shall also comply with the following special condition:

The defendant shall provide the probation officer with access all financial information and records as directed.

The Court finds that the defendant does not have the ability to pay a fine, especially in view of the requirement of restitution, and pursuant to 18 U.S.C. 3663A, the defendant shall make restitution of $28, 982.06 to the victim of this offense. Restitution is due immediately with any unpaid balance to be paid as a condition of supervised release.

Within 30 days of the commencement of the term of supervised release, the probation officer shall recommend a payment schedule to the Court to satisfy any unpaid balance of the restitution. The Court subsequently will enter an order establishing a schedule of payments.

It is ordered that the defendant pay a special assessment in the amount of $100 which shall be due immediately.

The Court intends to also recommend to the Bureau of Prisons that it designate a minimum security

institution or a federal prison camp for the service of the defendant's sentence.

After considering the factors to be considered in proposing a sentence as set forth in 18 U.S.C. § 3553(a), including an application of the advisory sentencing guidelines, and considering the facts of this particular case and after a careful review of the presentence investigation report, I have concluded that a reasonable sentence is the one that I have imposed. It happens to be a sentence within the imprisonment range of the sentencing guidelines after considering any basis for a departure upward or downward from that guideline range.

It is not, however, based solely on the sentencing guidelines. I have considered those to be simply one of seven factors that I must consider.

I also believe that the sentence is sufficient, but not greater than necessary, to:

Reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

To afford adequate deterrents to criminal conduct;

To protect the public from further crimes of the defendant; and

To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

APPENDIX D

STATUTORY APPENDIX

1. The Due Process Clause of the United States Constitution, Amendment V, provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

2. The Jury Trial Clause of the United States Constitution, Amendment VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

3. Section 3553 of Title 18 of the United States Code, titled "Imposition of a Sentence," provides, in relevant part, as follows:

> **(a) Factors to be considered in imposing a sentence.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR2-01-48
UNITED STATES OF AMERICA

v.

ALGIS JULIUS GALE, DEFENDANT

I, Edward Rini, being duly sworn according to law, state the following to be true to the best of my recollection:

1. I am a master mechanic and automobile expert.

2. I have known the Defendant, Algis Gale, since the early 1980's.

3. Algis Gale is known to me as a car collector who specializes in classic Cadillac convertibles.

4. As best as I can recall, late in 1995 and early 1996, Gale and his then business partner, Gary DeTrano, began looking for several classic Cadillac convertibles to buy, restore, and operate as part of a business venture.

5. At some point, two Cadillac convertibles from the 1940's were located on the West Coast. They were in good condition but needed restoration to be made who worthy for commercial purposes. Gale and DeTrano made arrangements with myself and my former landlord, Johnny

Walters (now deceased), to restore the cars both mechanically and externally to make them show worthy.

6. With my experience in this field, it is my opinion that in 1995-1996, the 1946 and 1947 Cadillacs in question would have been worth approximately $60,000 to $75,000 each when completely restored.

7. In order to secure space for the two cars and to begin ordering parts, Gale and DeTrano gave me a deposit of $2,500 per car in order to secure the space and buy the material and rare parts for the cars. The Deposit money had already been used and one half of the money had been given to Walters. I was ready to restore the cars and had done so for Gale n the past without any problems. We had in the past done a number of significant restorations for Gale and the Classic Car Club. Walters interest was later transferred to my then business associate, Joe Dibella.

8. I was notified by Gale in the Spring of 1996 that the cars had been stopped in transit out West and the transaction would not be completed. My shop never received the cars.

9. Both Johnnie Walters and I had always found Gale and his fellow Cadillac enthusiast to be a pleasure to work with over the years.

Further, affiant sayeth naught.

s/Edward Rini
Edward Rini

Sworn to and subscribed before me on this 22nd day of January 2003.

s/Leah Lawrence
NOTARY PUBLIC

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR2-01-48
UNITED STATES OF AMERICA

v.

ALGIS JULIUS GALE, DEFENDANT

I, Jeffrey Weinstein, being duly sworn according to law, state the following to be true to the best of my recollection:

1. I am a land developer and currently reside in New York. I have a number of years of experience in the building industry having started with my father. I met Algis Gale approximately 8-9 years ago through an ad he placed in the New York Times with his then partner, Gary DeTrano. I learned that Gale was a classic car enthusiast and that he specialized in classics of the 30's and 40's, mainly pre-war Cadillac convertibles.

2. I am also interested in classic cars. In the early art 1996, Gale first approached me and explained a problem he was having with two 1940's Cadillac convertibles. It was my understanding that Gale purchased the automobiles with Gary DeTrano but they had not been delivered from the West Coast due to a concern about the loan transaction. It was my understanding that the woman from the bank had diverted the cars while they were in transit and she was willing to sell the

cars for the amount of the loan, or less, which Gale advised me was $60,000.

3. According to the sources available to me at the time in 1996, the Cadillac convertibles, in an unrestored condition, were worth at least the amount of the loan, $60,000. Gale met me in my office and we called Pat McClintick of MidBanc. I asked her the location of the cars and offered her $40,000 for the two Cadillacs. She would not disclose the location of the cars and she said was not interested in my offer.

4. A week or two later, I called McClintick back and offered $50,000 for the two cars. Based on my sources and the representations made by Gale, I believed the cars could be restored and resold for a profit, which is what Gale and I intended to do. McClintick never called me back about my offer. I was stunned to find out that she had sold the cars for $20,000 when I had offered her $50,000.

5. After he disassociated himself with Gary DeTrano, I have been involved in a number of business transactions with Gale. I have always found Gale to be dependable, courteous, forthright, and industrious.

Further, affiant sayeth naught.

s/Jeffrey Weinstein
Jeffrey Weinstein

Sworn to and subscribed before me on this 21st day of January 2003.

s/Ann Woods
NOTARY PUBLIC

APPENDIX G

Connector Distribution Corporation
2985 Harcourt Street, Rancho Dominguez, CA 90221
310-632-2466 or FAX us back 310-632-5413

To: Al Gail [sic] From: Michael Canyon
FAX #: 6 E. Road Mail Stop:_____
Company: Port Washington, NY Date: 3-17-97

Message: I would very much like to discuss with you the details of Ed Cholakian's confisction [sic] of the 1947 Cad. Convt. known as "Big Tub" which you purchased from Tom Rydalch. I was the owner who sold it to Tom. (Tom is a friend of mine.)

I'm trying to verify Mr. Cholakian's legal right to the car before I attempt to re-purchase it.

Thanks-

MCanyon

APPENDIX H

MARTIN S. DORFMAN
COUNSELLOR AT LAW
1311 CROSSWAYS PARK DRIVE
WOODBURY, NEW YORK 11797
(516) 354-6464
FAX (516) 364-3890

ADMITTED TO PRACTICE IN:
NEW YORK
MARYLAND
DISTRICT OF COLUMBIA

April 30, 2003

Kort Gatterdam, Esq.
Kravitz & Kravitz, LLP
145 East Broad Street
Columbus, Ohio 43215-5240

Re: Algis Gale

Dear Mr. Gatterdam:

In our conversation of the other day you asked that I memorialize in a letter to you a conversation that I had with George Gavaleas, Esq., who had represented Mr. Gale in civil proceedings arising out of a loan made to our client by Midbanc in the approximate amount of $65,000.00. Although Mr. Gavaleas no longer had his file on the matter

he recalled hat there had been approximately $20,000.00 paid in repayment of the loan and that the remaining balance of $45,000.00 was settled for $20,000.00, but that further payments were made.

It is hoped that this information is sufficient for you purposes. Should you require anything further please do not hesitate to contact the undersigned.

Very truly yours,

s/Martin S. Dorfman
MARTIN S. DORFMAN

MSD/lb

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR2-01-48
UNITED STATES OF AMERICA

v.

ALGIS JULIUS GALE, DEFENDANT

I, Frank Stewart, being duly sworn according to law, state the following to be true to the best of my recollection:

1. I have known Al Gale since 1994 and have had continuing real estate dealings with him since that time, primarily in Brooklyn and Queens, New York.

2. I was a real estate manager and insurance agent but I am now retired. My wife, Rita Stewart continues to be a real estate agent for a local office.

3. The house my wife and I presently live in was once owned by Al Gale's wife, Danute Tautvilas and was managed in the 1994-1996 period by Gary DeTrano. The house was either being purchased or financed by a Greek individual named Serradas. Serradas and his wife were at the house on numerous occasions.

4. I remember that both Al Gale and Gray DeTrano were classic car enthusiasts and they would sometimes bring their cars to our house to show us. They were both very proud of the cars they bought.

5. One day in 1995 or 1996, Gary DeTrano called my wife and I to his office. He asked us to sign some applications for a car loan with some out of state institution. He explained that somehow this loan would help him pay off a Greek friend and investor. He indicated that he would fix up the credit to enable us to get another car for ourselves to use as well since he knew our car was not in good working order. We, of course did not sign the applications or take him up on his offer.

6. Al Gale was not involved in the aforementioned dealings with DeTrano and never asked me to sign any loan papers or anything related to car loan transactions in Ohio or anywhere else. In my dealings with Al Gale he has always been ethical, honest and reliable.

Further affiant sayeth naught.

s/Frank Stewart
FRANK STEWART

Sworn to and subscribed before me on this 16th day of April 2003.

s/Signature illegible
CHARLES FANTAZZO

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR2-01-48
UNITED STATES OF AMERICA

v.

ALGIS JULIUS GALE, DEFENDANT

I, Rita Stewart, being duly sworn according to law, state the following to be true to the best of my recollection:

1. I have known Al Gale since 1994 and have had continuing real estate dealings with him since that time, primarily in Brooklyn and Queens, New York.

2. I am a real estate agent for a local office in New York. My husband Frank was a real estate manager and insurance agent but he is now retired.

3. The house my husband I presently live in was once owned by Al Gale's wife, Danute Tautvilas and was managed in the 1994-1996 period by Gary DeTrano. The house was wither being purchased or financed by a Greek individual named Serradas. Serradas and his wife were at the house on numerous occasions.

4. I remember that both Al Gale and Gray DeTrano were classic car enthusiasts and they would sometimes bring their cars to our house to show us. They were both very proud of the cars they bought.

5. One day in 1995 or 1996, Gary DeTrano called my husband and I to his office. He asked us to sign some applications for a car loan with some out of state institution. He explained that somehow this loan would help him pay off a Greek friend and investor. He indicated that he would fix up the credit to enable us to get another car for ourselves to use as well since he knew our car was not in good working order. We, of course did not sign the applications or take him up on his offer.

6. Al Gale was not involved in the aforementioned dealings with DeTrano and never asked me to sign any loan papers or anything related to car loan transactions in Ohio or anywhere else. In my dealings with Al Gale he has always been ethical, honest and reliable.

Further affiant sayeth naught.

s/Rita Stewart
RITA STEWART

Sworn to and subscribed before me on this 16th day of April 2003.

s/Signature illegible
CHARLES FANTAZZO

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR2-01-48
UNITED STATES OF AMERICA

v.

ALGIS JULIUS GALE, DEFENDANT

I, Glen Rowan, being duly sworn according to law, state the following to be true to the best of my recollection:

1. I am familiar with Gray DeTrano and Al Gale.

2. I was involved in real estate deals in the Brooklyn and Queens areas of New York City with Gray DeTrano and Al Gale from 1994-1996.

3. DeTrano owed me money for property deeds on two or three family homes in Queens. He continued to give me excuses about why he could not pay me. He then told me that he had a plan to buy, renovate and resell some antique cars. He said that he would give me his share of the profits from the resale of the cars to pay what he owed me. In order to induce me to participate, DeTrano indicated he had done this in the past without a problem. I did not participate with DeTrano as an investor in the buying of the classic cars because I did not feel I could trust him.

4. At a later date, probably in 1996 or 1997, a Manhattan lawyer named Mitchell Troyetsky contacted me

regarding my dealings with DeTrano and Al Gale. Troyetsky's client was a Greek person by the name of Serradas. It is my belief that Troyetsky was attempting to get me to place blame on Al Gale and another individual named Ken Eder despite the fact that I had no evidence that either Gale or Eder did anything wrong.

5. I have known Al Gale for a number of years. In my past dealings with Al Gale he has always been ethical, honest and reliable.

Further affiant sayeth naught.

/s/Glen Rowan
GLEN ROWAN

Sworn to and subscribed before me on this 18th day of April 2003.

s/Signature illegible
LEAH LAWRENCE

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR2-01-48
UNITED STATES OF AMERICA

v.

ALGIS JULIUS GALE, DEFENDANT

I, Richard Sberlati, being duly sworn according to law, state the following to be true to the best of my recollection:

1. I live in Valley Stream, New York and have known the Defendant, Algis Gale, for 9-10 years. I met him through my job at the Walden Group (residential and commercial real estate mortgaging company), which was owned by Gary DeTrano and others. I was a solicitor and sales consultant for the Walden Group. My wife was an executive secretary and office manager.

2. Gary DeTrano was a hands on, often secretive manager. He kept a locked file cabinet to which only he had a key. Since he was not a licensed mortgage or real estate broker, Gary used Bernard Siegfried's license, as well as other mortgage brokers for various banks. Bernard Siegfried is now deceased.

3. DeTrano later needed investors. Ken Eder, Glen Rowan, Algis Gale, Danute Tautvilas, and later, Airinhos Serradas were investors with DeTrano. It is my

understanding that all of these persons did lose significant amounts of money at the hands of DeTrano.

4. Serradas was threatening DeTrano with legal action if DeTrano did not pay Serradas back. DeTrano decided to invest with Gale in a number of classic cars which they would restore, show, rent out and then resell for a profit. In this way, DeTrano could pay Serradas back what he owed him as well as pay other obligations.

5. The first two cars were located by Gale who was the most knowledgeable in dealing with classic mostly pre-war era Cadillacs. Gale believed the cars would be a safe and profitable venture. Gale and DeTrano made the applications through a bank in the Midwest which Gale had dealt with before. The loan documents were prepared by Gary DeTrano, Ray Dillon, and Christopher Pendarvis. Ken Eder indicated he made recordings of telephone conversations between DeTrano and Serradas' Attorney (and later Midbanc Attorney), Mitchell Troyetsky.

6. When his investment went bad, Serradas sued everyone in the office, including myself, my wife, DeTrano, Pendarvis, Dillon, Glae, And Tautvilas. I had no involvement with the classic car dealings.

7. In my past dealings with Gale, he has always been a nice person and has never been dishonest with me or my wife.

Further affiant sayeth naught.

/s/Richard Sberlati
RICHARD SBERLATI

Sworn to and subscribed before me on this 22nd day of January 2003.

s/Signature illegible
NOTARY PUBLIC

APPENDIX M

CHARLES S. HOCHBAUM
ATTORNEY AT LAW

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June 15, 2004

Kravitz & Kravitz
Attn: Kort Gatterdam
145 East Rich Street
Columbus, Ohio 43215

Re: Algis Gale

Mr. Gatterdam,

I was the attorney for Algis (Julius) Gale in the years 1981 to 1983 and represented him on numerous charges all relating to the use of phony certified checks and/or phony notary stamps.

All of these indictments: Indictment #52602, Indictment #52603, Indictment #52923 and Indictment #56884 were related and alleged to be part of a common scheme or plan under which Mr. gale defrauded various individuals.

I understand from our communications that there is an issue pending in the Federal Court as to how many criminal history points should be assessed to Mr. Gale from these various convictions so as to calculate his Criminal History Category and his sentencing range under the USSG.

In New York, unlike the Federal system there are no all encompassing conspiracy statutes which would allow a defendant to be charged under one indictment for various overt acts. A conspiracy to commit a felony in New York State is only a misdemeanor, so in lieu of one indictment charging all acts various indictments are filed. The varying arrest dates that are present in this case would be analogous to the filing of subsequent supplemental indictments wherein various new charges are made.

It is my recollection that my office surrendered Mr. Gale voluntarily as new charges were laid against him or that he was brought to Court from the Nassau County Correctional Center to appear on the subsequent charges.

All of these cases were treated as one. They were prosecuted by the same Assistant District Attorney and all sent to the same Judge (Judge Raymond Harrington) albeit the availability of approximately one dozen Judges in the Nassau County Court. All of the sentences imposed were run concurrently with one another, and Indictment # 52602 and an unindicted felony *Docket #5704/81) were dismissed in satisfaction of the pleas to Indictment #52603 and 52923.

I have been practicing primarily Criminal Defense Law for the past 27 years in both courts of New York State and the Federal Court. I am a member of the Criminal Justice Act Panel in both Southern and Eastern District of New York and render this opinion to you both as the attorney of record and an attorney familiar with both Federal and NY State Criminal Law.

If you have any further questions or need this letter in a different format (affidavit?) for the Sentencing Judge in the District Court please do not hesitate to contact me.

Very truly yours,

s/Charles S. Hochbaum
CHARLES S. HOCHBAUM

Supreme Court, U.S.
FILED
MAR 20 2007
OFFICE OF THE CLERK

No. 06-1157

In the Supreme Court of the United States

ALGIS J. GALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that the procedures applied in the determination of his sentence are not in accordance with *United States* v. *Booker*, 543 U.S. 220 (2005). On November 3, 2006, this Court granted certiorari in *Claiborne* v. *United States*, No. 06-5618 (argued Feb. 20, 2007), and *Rita* v. *United States*, No. 06-5754 (argued Feb. 20, 2007), to address various aspects of sentencing procedure under *Booker*. Because the proper disposition of the petition for a writ of certiorari may be affected by the Court's resolution of *Claiborne* and *Rita*, the petition should be held pending the decisions in those cases, and then disposed of as appropriate in light of those decisions.*

* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MARCH 2007